

Control Number: LSMB-4-0409-013
Expiration Date: 06/01/2010
Impacted IRM: 4.60.1

MEMORANDUM FOR COMMISSIONER, SMALL BUSINESS/SELF EMPLOYED
COMMISSIONER, TAX EXEMPT/GOVERNMENT ENTITIES
COMMISSIONER, WAGE AND INVESTMENT
CHIEF, COMMUNICATIONS AND LIAISON
CHIEF, CRIMINAL INVESTIGATION
DEPUTY COMMISSIONERS, LARGE AND
MID-SIZE BUSINESS
ALL INDUSTRY DIRECTORS
NATIONAL TAXPAYER ADVOCATE, TAXPAYER
ADVOCATE SERVICE
CHIEF COUNSEL

December 8, 2009

FROM: Commissioner, Large and Mid-Size Business

SUBJECT: Interim Guidance on Interactions with Foreign Tax Officials

The purpose of this memo is to issue interim guidance required for "Interactions with Foreign Tax Officials". This interim guidance transmits procedures for corresponding and interacting with foreign tax officials, until incorporated into the IRM. Please ensure that the attached information is distributed to all affected employees within your organization.

If you have any questions, please contact J.D. Carroll, Manager, Exchange of Information and Overseas Programs at (202) 435-5104.

[Attachment](#)

cc: www.irs.gov

Attachment

Interactions with Foreign Tax Officials

Introduction

Millions of U.S. citizens and businesses of all types and sizes participate in the global economy along with growing numbers of foreign persons and businesses. All indications are that the phenomenon of globalization will only increase and with it, worldwide challenges for tax administration.

As taxpayers around the world began thinking and working globally, tax administrations remained for the most part concerned with enforcement within their own borders. This situation has changed in recent years as the U.S. and other countries are increasingly improving and broadening cooperation in international tax matters.

This cooperation has resulted in a dramatic increase in interactions between IRS employees and foreign tax officials. These interactions happen at meetings, training sessions, conferences, joint projects, and other venues. These interactions can be mutually beneficial to the respective taxing authorities and the Service highly encourages them.

Should these interactions result in the need for the disclosure of returns or return information to foreign tax officials, it is important to remember that any disclosure of returns or return information must be authorized by the Internal Revenue Code. Improper disclosure of returns and return information, as defined under IRC § 6103(b), can result in civil or criminal penalties under IRC §§ 7431 and 7213. In addition, IRS employees should be aware that disclosing sensitive information, whether or not protected by IRC § 6103, without proper internal clearances could impair tax administration, harm governmental relations, or otherwise be contrary to public policy.

It is important that IRS employees know how to handle interactions with foreign tax officials including how information should be provided to or received from them. The following sections and exhibits will provide guidance on this subject.

- Categories of information defined and described
- Disclosure issues considered
- Programs for sharing and exchanging information
- Offices responsible for and authorized to exchange information
- Exhibit 1 summarizes the categories of information, disclosure issues, programs and offices for sharing and exchanging information

Categories of Information

Information is shared between two or more countries primarily for the purpose of strengthening the ability of countries to enforce their respective tax laws. This purpose is generally broadly interpreted to cover situations where the information may be relevant to

the administration and enforcement of the domestic tax laws of the impacted country or to prevent tax fraud and evasion.

Strict U.S. disclosure laws regarding returns and return information and the sensitive nature of certain information govern the exchange of such information with foreign tax officials. It is not uncommon for IRS personnel to interact with foreign tax officials in a number of different formal and informal situations. Thus, it is important to be aware of what category of information may be at issue during those interactions, how different categories of information may or may not be exchanged, and to recognize that information may be exchanged, not only in written form, but also orally and by electronic media.

Returns and return information, as defined under IRC § 6103(b), and other sensitive information, generally may not be provided to foreign tax officials unless the exchange is made under the provisions of an income tax convention, tax information exchange agreement, or other bilateral agreement relating to the exchange of tax information (collectively referred to as “tax information sharing agreements”). Examples of other bilateral agreements relating to the exchange of tax information include certain mutual legal assistance treaties (MLATs), which generally apply to the enforcement of criminal laws, as well as tax implementation or coordination agreements between the United States and the U.S. territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.

The Deputy Commissioner (International), LMSB, is the U.S. Competent Authority for administering tax information sharing agreements (Delegation Order 4-12 (Rev. 1)). All information exchanges pursuant to tax information sharing agreements must be made through the Office of the Deputy Commissioner (International), LMSB. Contact information for the offices under the Deputy Commissioner (International), LMSB, delegated to handle exchanges of information can be found under the [Director Treaty Administration and International Coordination](#) and [Joint International Tax Shelter Centre \(JITSIC\)](#).

Publicly Available Information

Publicly available information is that which can be accessed by the public in some medium. For example, information would be considered publicly available if available via the internet, found in a printed publication, or available in publicly accessible third party databases. This type of information may be provided to a foreign tax official without the need to exchange it under a tax information sharing agreement.

Note that publicly available information provided to foreign tax officials by the IRS must originate from and be attributable to the public source. Even though the information is publicly available IRS personnel must take care to share only the information from public sources and not information placed in and then taken from IRS files or internal databases.

The information in taxpayer-specific IRS files and databases, even if identical to information readily available in a public forum, is confidential return information of the

taxpayer from whose file the information was retrieved and can be released only as authorized by the Internal Revenue Code.

Non-Sensitive Information

Non-sensitive information may or may not be information that is readily available to the general public. Examples of non-sensitive information that is not publicly available are training materials or general non-taxpayer-specific articles prepared by IRS employees on a particular technical or legal issue that do not contain sensitive information such as criteria, tolerances, attorney work product or attorney-client communications. Non-sensitive information that is not a return or return information (as defined under IRC § 6103(b)) may be provided to a foreign tax official without the need to exchange it under a tax information sharing agreement.

Sensitive Information

Information may be considered sensitive if its disclosure could impair tax administration, harm governmental relations, or otherwise be contrary to public policy. Examples of sensitive information include emerging issues, enforcement strategies and draft published guidance to the extent that such issues, strategies, and guidance have not yet been made public. Sensitive information also includes tolerances and criteria such as Discriminant Index Formula (DIF) information.

Sensitive information generally will not be provided to a foreign tax official. However, if the organizational unit where the information originated decides to provide it to a foreign government, the exchange must take place through the U.S. Competent Authority under a tax information sharing agreement.

Taxpayer-Specific Information

Taxpayer-specific information includes returns and return information as defined under IRC § 6103(b). Taxpayer-specific information may only be provided to a foreign tax official through the U.S. Competent Authority under the provisions of a tax information sharing agreement and pursuant to IRC § 6103(k)(4).

Disclosure Issues when Sharing Information with Foreign Tax Officials

To ensure compliance with applicable disclosure and confidentiality rules, consideration must be given to the category of information being provided to the foreign tax official. Thus, as described in the preceding section, one must first determine if the information is publicly available, non-sensitive, sensitive, or taxpayer specific.

Information Provided to Foreign Tax Officials

(1) Publicly available information may be provided to foreign tax officials. There generally are no disclosure and confidentiality restrictions attached to such materials. However, information placed in taxpayer-specific IRS files, even if identical to information

readily available in a public forum, is considered confidential return information of the taxpayer from whose file the information was retrieved.

(2) Non-sensitive Information generally may be provided to foreign tax officials and the Service encourages the sharing of such information. However, prior to sharing, IRS employees should first confirm the information is not sensitive and its disclosure would not in any way impair tax administration. This includes a determination that there would be no problem if the information would be provided in response to a Freedom of Information Act (FOIA) request for such information and would not be withheld in litigation if requested during discovery.

(3) Sensitive information may be exchanged with foreign tax officials only through the U.S. Competent Authority under a tax information sharing agreement.

(4) Taxpayer-specific information may be exchanged with foreign tax officials only through the U.S. Competent Authority under a tax information sharing agreement and pursuant to IRC § 6103(k)(4).

Information Received from Foreign Tax Officials

(1) In addition to the disclosure considerations discussed above for **information provided to** foreign tax officials, there are disclosure restrictions regarding **information received from** a foreign tax official.

(2) Generally, information received from foreign tax officials pursuant to tax information sharing agreements (sensitive and taxpayer-specific information) is to be used and safeguarded by the IRS in accordance with the provisions of the tax information sharing agreement and IRC § 6105. In addition to the confidentiality rules contained in the tax information sharing agreement, these provisions generally incorporate the U.S. confidentiality rules under IRC § 6103. Note that information received pursuant to a tax information sharing agreement is generally stamped to indicate that it is protected from disclosure under the agreement and IRC § 6105.

(3) Employees should be aware that there are some circumstances that may require the IRS to disclose information received from foreign tax officials outside the IRS. Examples include potential disclosure of information pursuant to a FOIA request, a subpoena, or upon receipt of a court order. If employees have any concerns that foreign tax officials would be opposed to the IRS disclosing certain information under these circumstances, they should discuss the possibility with the U.S. Competent Authority who will consult with the foreign tax officials.

(4) Information received from foreign tax officials that is **not** transmitted under a tax information sharing agreement is **not** governed by the provisions of IRC 6105. Although IRC § 6103 would still apply to any taxpayer-specific returns or return information, the confidentiality provisions of IRC § 6105 and the tax information sharing agreement would **not** be applicable. Consequently, if IRS employees are aware of any concerns that foreign tax officials might have if such information were sought in response to discovery or FOIA requests in the U.S., the foreign tax officials should be advised to provide the

information pursuant to a tax information sharing agreement through the competent authority of their country. The information then could be protected from disclosure under the provisions of IRC 6105 and the tax information sharing agreement.

(5) If an IRS employee discovers or suspects that an unauthorized disclosure of information received from foreign tax officials may have occurred, the employee must immediately notify the Office of the Deputy Commissioner (International), LMSB, so that the Competent Authorities may discuss any necessary measures to rectify the situation or prevent any further unauthorized use or disclosure of the information.

Programs for Sharing Information with Foreign Tax Officials

The IRS has several information exchange programs and other venues available for freely sharing and exchanging information with foreign tax officials. The program or venue used will largely depend on the category or categories of information being shared.

The exchange programs and other venues can be divided into three groups:

- (1) Programs for exchanging taxpayer-specific and sensitive information;
- (2) Programs for sharing and exchanging publicly available, non-sensitive, and sensitive information; and
- (3) Programs and venues for sharing publicly available and non-sensitive information.

(1) Programs for Exchanging Sensitive and Taxpayer-Specific Information

Programs that allow for the exchange of sensitive and taxpayer-specific information are administered pursuant to tax information sharing agreements.

(A) Specific Exchange of Information Program

This program involves the coordination of requests generally pertaining to taxpayer-specific and sensitive information sent to or received from foreign treaty partners pursuant to tax information sharing agreements. Most requests originate from examinations, although requests may also come from collection activities, criminal investigations, or information gathering projects.

(B) Spontaneous Exchange of Information Program

This program involves the exchange of information that has not been specifically requested but, in the judgment of the providing Competent Authority, may be indicative of noncompliance with a treaty partner's tax laws and requirements. U.S. initiated spontaneous exchanges generally begin when IRS personnel (revenue agent, special agent, revenue officer, tax compliance officer, etc.) develop information during the course of an audit or investigation.

(C) Automatic Exchange of Information Program

The Automatic Exchange of Information Program concerns information about one or various categories of income that is systematically exchanged with a treaty partner. It may be considered a type of spontaneous exchange insofar as information about a particular taxpayer is not specifically requested by the receiving country. In terms of the information the U.S. provides to treaty partners, it currently includes information extracted from Form 1042-S, relating to U.S. sourced fixed or determinable income (such as dividends, royalties, etc.) paid to persons claiming to be residents of the receiving treaty country. Generally, the information that the IRS automatically exchanges (provides and receives) consists of hundreds of thousands of records exchanged by way of magnetic media. Other automatic information that may be of interest to treaty partners may also be exchanged under this program, such as real estate sales of residents of the receiving treaty country.

(D) Simultaneous Examination Program (SEP) and Simultaneous Criminal Investigation Program (SCIP)

These programs involve cases where the IRS and a treaty partner's tax administrator are examining or investigating a taxpayer or related taxpayers with common issues. In a SEP or SCIP meeting, the examiners or investigators are afforded the opportunity to discuss issues, audit plans and information needs. Exchange of Information analysts work with field revenue and special agents in coordination with their counterparts in the foreign competent authority and field offices to evaluate proposals and facilitate specific and spontaneous exchanges of information which may be appropriate for each country to complete its examination or investigation. The determination of whether to commence a SEP or SCIP case is made by the Competent Authorities, as provided in the SEP or SCIP agreement.

(2) Program for Sharing and Exchanging Publicly Available, Non-Sensitive Information and Sensitive Information

Industry-wide Exchanges of Information Program

Industry-wide Exchanges of Information involve meetings between U.S. and foreign tax officials. They do not involve taxpayer-specific returns or return information. Instead they are exchanges about trends, operating practices, pricing policies, know-how, or experience in particular industries, economic sectors, or other areas of common interest. Information that is publicly available or non-sensitive may be freely shared with foreign tax officials without the need to exchange it under a tax information sharing agreement. However, information that is sensitive in nature should be exchanged through the Competent Authorities under a tax information sharing agreement.

(3) Programs and Venues for Sharing Publicly Available and Non-Sensitive Information

The following programs and venues allow for the sharing of publicly available and non-sensitive information with foreign tax officials. Under these programs and venues, such

information may be freely shared with foreign tax officials without the need to exchange the information under tax information sharing agreements.

(A) [International Visitors Program \(IVP\)](#)

The International Visitors Program provides foreign government officials with an opportunity to meet in the U.S. with IRS subject-matter experts who provide overviews of IRS programs and policies. All information shared is available to the general public. IVP does not involve exchanges under tax information sharing agreements. This program is administered by International Meeting, Travel and Visitors Office under the Deputy Commissioner (International), LMSB.

(B) Other venues available for sharing publicly available and non-sensitive information include:

- Meetings
- Conferences
- Seminars
- Training sessions
- Telephone and video conferencing

Offices Responsible for and Authorized to Exchange Information with Foreign Tax Officials

The Deputy Commissioner (International), LMSB, is the U.S. Competent Authority for the administering of tax treaties, tax information exchange agreements, and other bilateral agreements relating to the exchange of tax information (collectively referred to “tax information sharing agreements”). The following offices, under the Deputy Commissioner (International), LMSB, are delegated to handle exchanges of information under tax information sharing agreements (Delegation Order 4-12 (Rev.1)):

(1) [Exchange of Information and Overseas Operations](#)

The Manager, Exchange of Information and Overseas Operations, reports to the Director, Treaty Administration and International Coordination in the Office of the Deputy Commissioner (International), LMSB. The Manager, Exchange of Information and Overseas Operations, is delegated authority to exchange information with all countries with which the U.S. has a tax information sharing agreement.

(2) [Tax Attachés and Revenue Service Representative](#)

Tax Attachés serve in the IRS overseas posts of duty and the Revenue Service Representatives (RSRs) serves in domestic post of duties. They report to the Director, Treaty Administration and International Coordination in the Office of the Deputy

Commissioner (International), LMSB. Tax Attachés service all functions of the IRS in tax administration matters within their respective post jurisdictions.

Criminal Investigation (CI) also has Attachés stationed abroad. However, they are not delegated authority to handle exchanges of information under tax information sharing agreements. When CI Attachés need to obtain or receive information under tax information sharing agreements, they work with the Tax Attachés and Revenue Service Representative who have delegated authority to make such exchanges.

(3) [Joint International Tax Shelter Information Centre](#)

The Joint International Tax Shelter Information Center (JITSIC) includes tax agencies from various countries. Representatives from the member countries work together in Washington, D.C. and London, England to supplement the ongoing work of member tax administrations in identifying and curbing abusive tax avoidance transactions, arrangements and schemes and to enhance activities against cross-border transactions involving tax compliance risks. The objective of JITSIC is to enhance each Revenue Authority's enforcement efforts through coordinated and real time exchanges of tax information consistent with the provisions of our bilateral income tax conventions. Reporting to the Deputy Commissioner (International), LMSB, U.S. JITSIC Technical Advisors and Delegates are designated to act as "Competent Authority" under the bilateral income tax treaties with JITSIC member countries for exchanges of information related the JITSIC.

[Exhibit 1](#)

Exhibit 1 provides an overview of the categories of information, disclosure issues, programs and venues available, and the office responsible for and authorized to share or exchange information with foreign tax officials.

For additional information, go to [LMSB International](#).

EXHIBIT 1 - Overview of Information Categories, Disclosure Issues, Program and Offices for Sharing and Exchanging Information with Foreign Tax Officials

Category of Information	Publicly Available	Non-Sensitive Information (Not Publicly Available)	Sensitive Information	Taxpayer Specific Information
Information Examples	<ul style="list-style-type: none"> • www.irs.gov information • Published article (not as part of case file) • Financial products used by banks on a worldwide basis and how issue is treated in various jurisdictions • Information from Lexis/Nexis (not as part of case file) • Chief Counsel Advice (CCAs) (redacted and publicly available version) 	<ul style="list-style-type: none"> • Training materials – no sensitive information • Articles or reports prepared by IRS employees that do not include any sensitive or taxpayer information • Summary of conference notes – no taxpayer return information or sensitive information 	<p>To the extent that information is not yet public:</p> <ul style="list-style-type: none"> • Program plans or policy initiatives • Unique investigative techniques • Draft published guidance • Emerging issues • Enforcement strategies <p>Also includes:</p> <ul style="list-style-type: none"> • Tolerance/grace periods • Discriminant Index Formula (DIF) information • Any other information that could impair tax administration if disclosed 	<ul style="list-style-type: none"> • Any information in the taxpayer's audit file (including published articles or other publicly available information which is part of case file) • Any information gathered in connection with audit of taxpayer • Information that, although does not mention a specific taxpayer by name, could reasonably identify a taxpayer • Discriminant Index Formula (DIF) Scores
Disclosure Issues	Information can be freely shared without the need to provide it under a tax information sharing agreement.		Information must be exchanged pursuant to a tax information sharing agreement to ensure compliance with applicable disclosure and confidentiality rules.	
Programs for Sharing and Exchanging Information	<ul style="list-style-type: none"> • International Visitors Program (IVP) provides foreign government officials with an opportunity to meet in the U.S. with IRS subject matter experts who provide overviews of the IRS' programs and policies. All information shared is available to the general public. . • Other Venues for sharing publicly available information: <ul style="list-style-type: none"> ▪ Meetings ▪ Seminars ▪ Conferences ▪ Telephone and video conferencing, etc. 		<ul style="list-style-type: none"> • Specific Exchange of Information involves the coordination of requests pertaining to taxpayer-specific and sensitive information sent to or received from foreign treaty partners pursuant to tax information sharing agreements. • Spontaneous Exchange of Information involves exchange of information under tax information sharing agreements that has not been specifically requested, but which may be indicative of noncompliance with the foreign country's tax laws. • Automatic Exchange of Information involves the exchange of bulk information that is not specifically requested by the receiving country. In terms of the information the U.S. provides to treaty partners, it currently includes information from Forms 1042S, relating to U.S. source fixed or 	

		<p>determinable income paid to persons claiming to be residents of the receiving treaty country.</p> <ul style="list-style-type: none"> • Simultaneous Examination and Simultaneous Criminal Investigation Programs involve cases where the US and tax treaty partner are examining or investigating a taxpayer, or related taxpayers, with common issues.
	<ul style="list-style-type: none"> • Industry-Wide Exchange of Information Program involves exchange of non-taxpayer-specific information (publicly available, non-sensitive and sensitive) under tax treaties and tax information exchange agreements between U.S. and foreign tax officials concerning trends, operating practices, pricing policies, strategies, know-how and experience in particular industries, economic sectors, or program areas. Under this program, information that is publicly available or non-sensitive can be freely shared with foreign tax officials without the need to exchange it under a tax information sharing agreement. However, information that is sensitive in nature must be exchange under a tax information sharing agreement. 	
Offices Delegated to Exchange Information	<p>This category of information can be freely shared with the foreign tax official. No tax information sharing agreement needs to be involved as no disclosure or confidentiality provisions would be attached to such information.</p>	<p>This category of information should be provide to or received from a foreign tax official under a tax information sharing agreement. The Deputy Commissioner (International), LMSB, has delegated the following offices to exchange information under tax information sharing agreements (Delegation Order 4-12 (Rev.1)):</p> <ul style="list-style-type: none"> • Office of Exchange of Information in Washington, DC • Tax Attachés and Revenue Service Representatives • Joint International Tax Shelter Information Centre (JITSIC)